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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JEROME GREEN, Defendant and Appellant.	A103106 (San Francisco County Super. Ct. No. 181851)

Defendant Jerome Green appeals from a judgment upon a jury verdict finding him guilty of rape. (Pen. Code,[1] § 261, subd. (a)(2).) He alleges error based on inadequate jury instructions, abuse of discretion by the trial court in admitting evidence, insufficiency of the evidence, and improper imposition of a six-year sentence. We affirm.

I. BACKGROUND AND PROCEDURAL HISTORY

Kelley D. first met Green in June 2000, when her friend, Jennifer C., introduced her to him at a bar. At some point after they met, Kelley and Green went to the outside patio of the bar where they kissed. She agreed to go with Green to his apartment. Kelley felt intoxicated at the apartment and took some aspirin. They kissed and talked on the balcony and couch, and eventually fell asleep on Green's bed. Kelley fell asleep wearing only her jeans and bra. She testified that she did not have sex with Green that night.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

They exchanged telephone numbers and while Kelley called Green a couple of times, Green did not return her calls. She thought he was "rude" and a "jerk" for not doing so.

Kelley did not see Green again until August 18, 2000, when Jennifer invited her to a bar in San Francisco with a group of friends, including Green. Kelley and Jennifer arrived at MoMo's about 9:00 p.m. and subsequently met with about 20 of Jennifer's friends. Kelley eventually spoke with Green and they held hands. Later, Kelley, under the impression that Green needed to get his belongings and keys from a friend's nearby apartment, accompanied Green to the apartment so she could use the bathroom. She decided to walk the "couple" of blocks to use the bathroom in the apartment, since the bar was so crowded that she "couldn't even get across the bar."

Upon their arrival, the apartment was locked. They kissed at the apartment door, then walked back toward the bar. As they passed Green's car, he pulled out his keys, which surprised Kelley since he had told her his keys were in the apartment. While kissing at the car, Green twice opened the car door and attempted to guide Kelley into the back seat. She pushed herself back out of the car, closed the door, and told Green that she wanted to return to the bar so she could use the bathroom. She was then shocked to notice that Green had exposed his erect penis. She tossed his sweatshirt that she had borrowed back at him, told him to cover himself up, said "this is ridiculous," repeated that she wanted to return to the bar, and walked away. Green caught up with her and tried to hold her hand and kiss her again. She pulled away, saying she was going back to the bar. Green then grabbed her by the hand and pulled her down an alley. She resisted, but she could not free her hand from his.

In the alley, Green turned Kelley around and pushed her facedown onto a woodpile. She again said that she wanted to go back to the bar, but he held her down with one hand on her back, pulling down her leggings with the other hand as she tried to pull them back up. He told her to be quiet, and finally inserted his penis into her vagina. She was scared and cried.

Kelley told Green "no," "not like this, not here," she "didn't want to do this," and that she wanted to go back to the bar. When a car drove down the alley and slowed

down, Green stopped, and Kelley unsuccessfully attempted to push herself up off the woodpile. Green told her he was "almost done," at which point Kelley "gave up." A minute or two later, Green withdrew his penis. Kelley walked back to the bar, with Green following her. Jennifer saw them approach the bar and noticed that neither Kelley nor Green was smiling, and they did not look happy. Another friend, Aaron W., noticed that Kelley looked visibly upset, as if she was about to cry or had been crying, and was shaking. Later that night, Kelley, still crying and shaking, told Jennifer that she had cut herself on a woodpile and that she gave Green the "wrong impression" by kissing him, and "let it go too far." She told Jennifer that she had said "no" to Green and that she had not wanted to have sex with him. Jennifer told Aaron that Kelley had told her she was raped.

The next day, at work, Kelley was unable to control her crying, and told a supervisor about the episode with Green. The supervisor called the police and reported the incident. At the hospital, a police officer photographed her injuries, which included bruises to her foot and forearm, scrapes on her leg and elbow, and a cut on her ankle; a vaginal examination was also conducted. DNA testing confirmed the presence of Green's semen inside Kelley's vagina.

Ruth A. testified about an incident that occurred between her and Green in 1995. Ruth became acquainted with Green while attending college. During a party held at his fraternity house, Ruth socialized with Green and decided to go dancing with him and some other friends. Ruth and Green waited outside the house for the others to join them. When Green kissed her, Ruth told Green that they should look for her friend Paris, who had not yet joined them. Green said that he knew where she was and led her back into the house. Green took Ruth into the laundry room. After closing and locking the door, he backed Ruth into a washing machine, tried to kiss her, then picked her up and sat her on top of the washing machine. She felt uneasy and told Green that she wanted to go home. Grabbing her legs, he pulled her forward, and placed himself between her legs. Green attempted to kiss her and undo her bra. Ruth repeatedly attempted to pull away and to push Green away, telling him she wanted to leave. He finally locked his arms

around her back. She cried and asked Green to stop. Green tried to unbutton her jeans. Feeling scared, and believing she would be raped if she did not flee, Ruth kicked Green in the groin, and ran from the room. She did not report the incident to the police because she did not want to be responsible for shutting down the fraternity.

In defense, Green testified that Kelley consented to intercourse with him. Before entering the alley, they engaged in prolonged kissing, and Green claimed that Kelley moved her hand down his pants and rubbed against him. According to Green, they walked together down the alley, and engaged in consensual intercourse. He denied that Kelley told him to stop. He also testified that they had previously engaged in sexual intercourse in June 2000. Green admitted kissing and hugging Ruth in the laundry room at his fraternity house, but denied that Ruth kicked him.

II. DISCUSSION

A. The Jury Instructions on Withdrawn Consent

During deliberations, the jury presented several written questions to the court. One question inquired, "Does non-consent against her will at any time during the act of sexual intercourse violate Penal Code 261(a)(2) . . .—specifically point # 3?" "Point # 3" referred to the portion of CALJIC No. 10.00[2] which states: "The act of intercourse was against the will of the alleged victim." The prosecutor argued that if the court declined to answer this question with a simple "yes," then it should use language from *In re John Z.* (2003) 29 Cal.4th 756, 757-758, 760 (*John Z.*), which held that a withdrawal of consent during intercourse invalidates any earlier consent and forcible continuation thereafter is rape. Defense counsel argued that *John Z.* was irrelevant because in Green's case there was no issue of withdrawn consent, and that instructing with *John Z.* would violate the ex post facto clause. The trial court found *John Z.* simply clarified existing law and did not

[2] CALJIC No. 10.00 provides in relevant part: "Every person who engages in an act of sexual intercourse with another person who is [not] the spouse of the perpetrator accomplished against that person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury [to that person] [or] [to another person], is guilty of the crime of rape in violation of Penal Code section [261, subdivision (a)(2)] [262, subdivision (a)(1)]. [¶] Any sexual penetration, however slight, constitutes engaging in an act of sexual intercourse. [Proof of ejaculation is not required.]"

violate ex post facto principles. Accordingly, the court informed the jury that a rape is committed under the scenario it presented in its question: "Yes. If the alleged victim expresses an objection and attempts to stop the act and the defendant forcibly continues despite the objection." The court prefaced its instruction with a cautionary statement that the giving of an instruction does not mean the court is expressing an opinion as to the facts.

Following the guilty verdict, defense counsel moved for a new trial, claiming the court inadequately instructed the jury about the law pertaining to the offense of "post-penetration rape." The trial court denied the motion.

Green alleges error in the trial court's instruction on the following grounds: (1) The court failed to reread to the jury the consent and the reasonable and good faith belief in consent instructions after receiving the jury's question concerning withdrawn consent; and (2) the court failed to instruct on the defenses in withdrawn consent cases, as suggested in Justice Brown's dissenting opinion in *John Z., supra*, 29 Cal.4th at pages 764-768.

Respondent argues that Green waived any error in the court's instructions because he failed to request that the jury receive a pinpoint instruction or be reinstructed on consent and reasonable good faith belief. The record demonstrates, however, that defendant strenuously objected to the instruction and argued that *John Z.* was inapplicable to the case. Hence, he preserved the issue for appeal. (Cf. *People v. Rivera* (1984) 162 Cal.App.3d 141, 146 [defendant waived right to challenge instructional error where he failed to make an objection in the trial court].)

Here, relying on the dissent in *John Z.,* Green contends that the court should have given cautionary pinpoint instructions that the jury consider (1) whether Kelley's withdrawal of consent was equivocal, (2) whether the evidence established that Green understood consent to be withdrawn, and (3) whether Green ceased the act of intercourse in a sufficiently timely manner thereafter. (*John Z., supra,* 29 Cal.4th at p. 767, dis. opn. of Brown, J.) Additionally, relying on *People v. Roundtree* (2000) 77 Cal.App.4th 846 (*Roundtree*), Green argues that, following the jury's question, the court should have

reread the consent (CALJIC No. 1.23.1)[3] and the reasonable and good faith belief in consent (CALJIC No. 10.65)[4] instructions. According to Green, had the jury been so instructed, then it is reasonably probable it would have acquitted him. Furthermore, he argues that his substantial rights were affected as a result of the court's failure to give any guidance to the jury concerning his defenses in determining whether he committed a rape.

The cases of *Roundtree* and *John Z.* both address the issue of withdrawn consent in a rape case. In *Roundtree*, the defendant claimed that the victim initially consented to intercourse, and then later changed her mind. The jury asked the trial court whether an act would constitute rape if, after intercourse began, the victim changed her mind and told the defendant to stop, but the defendant continued the act of penetration. (*Roundtree, supra*, 77 Cal.App.4th at pp. 849-850.) The court answered that if all the elements of rape are present, the fact that initial penetration occurred with the victim's consent does not negate a finding of rape. (*Id.* at p. 850.) The court then reread the CALJIC definitions of rape and consent, and for the first time instructed the jury with CALJIC No. 10.65 (reasonable and good faith belief in consent). (*Roundtree*, at p. 850.) In the *John Z.* case, our Supreme Court relied heavily on *Roundtree.* (*John Z., supra,* 29 Cal.4th at p. 761.) There, a juvenile male had sexual intercourse with a young female who purportedly consented, then withdrew her consent during intercourse, but the

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[3] CALJIC No. 1.23.1 addresses consent in the context of rape, and incorporates the following language: "the word 'consent' means positive cooperation in an act or attitude as an exercise of free will. . . ."

[4] CALJIC No. 10.65 addresses belief as to consent in the context of forcible rape. It includes the following language: "In the crime of [unlawful] [forcible rape] . . . criminal intent must exist at the time of the commission of the (crime charged) . There is no criminal intent if the defendant had a reasonable and good faith belief that the other person voluntarily consented to engage in [sexual intercourse]. . . . Therefore, a reasonable and good faith belief that there was voluntary consent is a defense to such a charge. [¶] [However, a belief that is based upon ambiguous conduct by an alleged victim that is the product of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another is not a reasonable good faith belief.] [¶] If after a consideration of all of the evidence you have a reasonable doubt that the defendant had criminal intent at the time of the [sexual intercourse] . . . , you must find [him] [her] not guilty of the crime."

defendant ignored her protests and continued to penetrate her. (*Id.* at pp. 759-760.) The court held that forcible rape was committed when, during initially consensual sexual intercourse, the victim expressed an objection and attempted to stop the act, and the defendant forcibly continued despite her objection. The court did not address what pinpoint instructions, if any, might be appropriate in withdrawn consent cases because the case involved an appeal from a juvenile adjudication, rather than a jury trial. (*Id.* at pp. 762-763.)

Both *John Z.* and *Roundtree*, in effect, require that the trial court inform the jury that it cannot find a defendant guilty of rape unless all the elements of rape are present. Here, the trial court did so inform the jury in its instructions and in its response to the jury's question. The court had previously instructed the jury with the definitions of rape, consent, and the defense of a reasonable and good faith belief in consent. These instructions were a correct and complete statement of the applicable law. (*People v. Kelly* (1992) 1 Cal.4th 495, 525-526.) No further instructions were warranted.[5]

B. The Evidence of the Uncharged Incident

Green contends that the trial court abused its discretion in admitting the evidence of the uncharged conduct involving Ruth. He argues that the conduct did not constitute a "sexual offense" within the meaning of Evidence Code section 1108,[6] and that the

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[5] Defendant's reliance on Justice Brown's dissent in *John Z.* is misplaced. The trial court was not required to give cautionary pinpoint instructions consistent with the dissent concerning whether the victim clearly communicated withdrawal, whether the defendant understood that consent was withdrawn, and whether he acted in a timely manner to cease the intercourse. As the Attorney General notes, the dissenting opinion in *John Z.* has no binding legal authority. We are obligated to follow the majority decisions of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Moreover, the trial court's instructions correctly informed the jury of the crime of rape.

[6] Evidence Code section 1108 provides in relevant part: "(a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is *not* made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352. [¶] . . . [¶] [(d)](1) 'Sexual offense' means a crime . . . that involved any of the following: [¶] . . . [¶] (B)

evidence was unduly prejudicial and therefore inadmissible under Evidence Code section 352.

Evidence of a prior sexual offense is admissible in a prosecution for another sexual offense. (Evid. Code, § 1108, subd. (a).) The statute, which allows the admission of propensity evidence in sex offense cases, is intended to relax the requirements of Evidence Code section 1101 for admission of evidence to prove a character trait. (*People v. Falsetta* (1999) 21 Cal.4th 903, 911.) Although Evidence Code section 1108 expands the admissibility of such evidence, admission remains subject to exclusion under Evidence Code section 352. (*Falsetta*, at pp. 916-917.)

Here, the trial court found that the conduct was admissible under Evidence Code section 1108 and that the probative value of the evidence outweighed its prejudicial effect. The record contains substantial evidence supporting the trial court's finding.

As the Attorney General argues, Green's conduct against Ruth constituted an assault with intent to commit rape. An assault with intent to commit rape is a sexual offense within the meaning of Evidence Code section 1108. (*People v. Pierce* (2002) 104 Cal.App.4th 893, 896 (*Pierce*).) Contrary to Green's argument, there is substantial evidence in the record that Green intended to commit a sexual offense upon Ruth.[7] Ruth testified in detail about the assault, including Green's taking her to a secluded location, restraining her movement, and attempting to undress her, and her repeated requests that he stop. Ruth continually cried as Green tried to kiss her and undo her bra. As she tried to push Green away, he kept grabbing her and pulling her forward. When he tried to undo the buttons on her jeans, she managed to kick him in the groin and was able to get away. She testified that she was scared and thought that if she did not get out of the room Green would rape her. Given the evidence, Green's conduct against Ruth was clearly

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Any conduct proscribed by Section 220 of the Penal Code, except assault with intent to commit mayhem." (Italics added.)

[7] We note that under CALJIC No.2.50.1, the prosecution need only prove Green committed the prior offense by a preponderance of the evidence.

sufficient to support a charge of assault with intent to commit rape; the evidence was admissible as a sexual offense within the meaning of Evidence Code section 1108.

While the evidence was admissible under Evidence Code section 1108, its admissibility, as the trial court recognized, was subject to exclusion under Evidence Code section 352. Defendant contends that the court abused its discretion in admitting evidence of the incident with Ruth because the evidence was inflammatory, it had a tendency to confuse the jury, and it was remote in time. He also asserts that the evidence was more prejudicial than probative because it pertained to an uncharged and unreported incident.

We review a challenge under Evidence Code section 352 for abuse of discretion. (*People v. Branch* (2001) 91 Cal.App.4th 274, 282.) As stated in *Branch*, courts must balance the probative value of the evidence against four factors: "(1) the inflammatory nature of the uncharged conduct; (2) the possibility of confusion of issues; (3) remoteness in time of the uncharged offenses; and (4) the amount of time involved in introducing and refuting the evidence of uncharged offenses." (*Ibid.,* citing *People v. Harris* (1998) 60 Cal.App.4th 727, 737-741 (*Harris*).) The trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) "Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' " (*Id*. at pp. 1124-1125.)

Applying those factors here, and considering all of the circumstances, we conclude that the trial court did not abuse its discretion in admitting evidence of the uncharged conduct with Ruth. First, the evidence of the sexual assault on Ruth was less inflammatory than the charged conduct. (See *People v. Poplar* (1999) 70 Cal.App.4th 1129, 1139 [prior acts of domestic violence no more inflammatory than the evidence of the charged rape]; cf *Harris*, *supra*, 60 Cal.App.4th at pp. 731-738 [evidence of prior violent sexual offense more inflammatory than charged sexual offenses that did not

involve violence].) Second, there is nothing in the record to indicate that the jury was confused by the evidence. Ruth's testimony was brief and described a distinct incident. And, the court explained the limited purpose of the evidence both immediately following Ruth's testimony, and again prior to submitting the case to the jury. Third, the evidence of the incident was not too remote. The incident occurred less than six years prior to the charged offenses. (See *Pierce, supra*, 104 Cal.App.4th at p. 900 [23-year-old prior rape conviction admissible; cf. *Harris, supra*, 60 Cal.App.4th at p. 739 [conduct occurring 23 years before present charges meets threshold test of remoteness].) Finally, the evidence was extremely probative. The incident with Ruth was strikingly similar to the charged rape. That the prior incident was not reported or charged does not preclude its admission in a subsequent proceeding. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 394 ["evidence of uncharged similar misconduct may be employed to establish a common design or plan"].) Both offenses involved Green's engaging in unwanted sexual advances with women he knew. In both instances, Green led the women to secluded locations, ignored their requests to stop, and used force to accomplish or attempt a sexual assault. In sum, the evidence was more probative than prejudicial; the evidence was properly admitted.

C. Sufficiency of the Evidence to Sustain the Rape Conviction

Green contends that the evidence at trial was insufficient to support the verdict finding him guilty of rape. In particular, he argues that there was insufficient evidence to sustain a conviction for the offense of "post-penetration rape."

In determining whether the evidence is sufficient to support the verdict, we must review " 'the whole record in the light most favorable to the judgment' and decide 'whether it discloses substantial evidence . . . such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " (*People v. Hatch* (2000) 22 Cal.4th 260, 272, quoting *People v. Johnson* (1980) 26 Cal.3d 557, 578.)

Green argues that all of the reported decisions dealing with withdrawn consent are factually distinguishable from his case. To support his argument, Green cites *John Z.* and other withdrawn consent cases relied on by the *John Z.* court. (See *Roundtree, supra,* 77 Cal.App.4th 846; *State v. Robinson* (Me. 1985) 496 A.2d 1067; *State v. Crims*

(Minn.Ct.App. 1995) 540 N.W.2d 860; *State v. Siering* (Conn.Ct.App. 1994) 644 A.2d 958.) According to Green, these cases show a clear and unequivocal withdrawal of consent by the victims, followed by the defendants' failure to terminate the acts of intercourse; some cases included evidence of physical violence. By contrast, Green argues that Kelley conceded to giving him the "wrong impression," he did not subject her to any physical force, she was equivocal about wanting him to stop, he was not aware that she wanted him to stop, and the entire incident took place very quickly.

Green ignores the overwhelming evidence in the record, which we have already reviewed, that he raped Kelley. While Green would have this court accept his version of the incident, the issue of the credibility of the witnesses and the truth or falsity of the facts on which that determination depends was one for the jury. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The jury resolved the credibility issue against Green and rejected his claim that Kelley consented. Substantial evidence supports the verdict.

D. The Six-Year Sentence

Before sentencing, the prosecution filed a statement in aggravation, stating that the victim was particularly vulnerable (Cal. Rules of Court,[8] rule 4.421(a)(3)); Green took advantage of a position of trust or confidence to commit the offense (rule 4.421(a)(11)); Green engaged in violent conduct indicating he poses a danger to society (rule 4.421(b)(1)); and Green's prior convictions are numerous or of increasing seriousness (rule 4.421(b)(2)). Defense counsel in turn filed a statement in mitigation, arguing that: Green had an insignificant criminal record (rule 4.423(b)(1)); he would have been granted probation but for his statutory ineligibility under section 1203.065, subdivision (a) (rule 4.423(b)(4)); his prior performance on probation was satisfactory (rule 4.423(b)(6)); the crime was committed because of an unusual circumstance which is not likely to recur (rule 4.423(a)(3)); he exercised caution to avoid harm, and no harm was done or threatened against the victim (rule 4.423(a)(6)); and he mistakenly believed the conduct was legal (rule 4.423(a)(7)). The probation officer's report cited no mitigating

[8] All further rule references are to the California Rules of Court.

factors and one aggravating factor, specifically, that the crime involved a high degree of callousness.

At sentencing, the court denied probation and imposed the midterm of six years. Green contends the court erred by imposing a six-year sentence because it failed to consider all the mitigating factors. We disagree.

The midterm is statutorily presumed to be the appropriate term unless there are circumstances in aggravation or mitigation of the crime. (§ 1170, subd. (b); rule 4.420(a).) When such circumstances are presented, sentencing courts enjoy wide discretion in weighing the aggravating and mitigating factors, and may balance these factors against each other in both qualitative and quantitative terms. (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582.) We must affirm unless there is a clear showing the sentence choice was arbitrary or irrational. (*Ibid.*)

It is evident from the record that the trial court weighed both the mitigating and aggravating factors. It found one factor in aggravation, namely that Green's conduct indicated he posed a danger to society, and one factor in mitigation, namely that Green's prior performance on probation was satisfactory. Accordingly, having weighed and rejected all the other factors put forth by both sides, the court found the circumstances in mitigation and in aggravation evenly balanced and therefore imposed the midterm.

Green contends that the court failed to give proper weight to some of the factors in mitigation, which would have tipped the balance in his favor. For example, it failed to find that Green had an insignificant record of criminal conduct. However, Green was convicted in 1994 for purchasing counterfeit obligations, which is a felony. Green also argues that the court should have found the rape to be committed because of unusual circumstances not likely to recur. But, the evidence suggests otherwise, given the similar modus operandi of the assaults on Kelley and Ruth. Green also complains that the court erred by not finding that he mistakenly believed his conduct was legal. The jury having rejected Green's claim on this point, the court did not err in refusing to consider this factor. There was no error in the sentencing.

III. DISPOSITION

The judgment is affirmed.

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RIVERA, J.

We concur:

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REARDON, Acting P. J.

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SEPULVEDA, J.

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